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# Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?

Mark Adams

*University of Idaho College of Law, marka@uidaho.edu*

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## COMPULSORY ARBITRATION OF DISCRIMINATION CLAIMS AND THE CIVIL RIGHTS ACT OF 1991: ENCOURAGED OR PROSCRIBED?

MARK L. ADAMS<sup>†</sup>

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<sup>†</sup>Associate Professor, Valparaiso University School of Law. B.A., 1983, Williams College; J.D., 1988, University of Chicago. The Author thanks his colleagues Ivan Bodensteiner, Rosalie Levinson, and Sally Holterhoff for their insights and expertise; his research assistants Adrienne Hoehner, Kim Welsh, Christine Flores, and Camille Anderson for their suggestions and attention to details; Michael Rubin of Altshuler, Berzon, Nussbaum, Berzon & Rubin for sharing his views and experience; and Melissa, Ingrid, and Kelly for their support.

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## I. INTRODUCTION

In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>1</sup> that an employee's agreement to arbitrate employment-related disputes may require arbitration of statutory claims under the Age Discrimination in Employment Act (ADEA).<sup>2</sup> Although the Supreme Court in *Gilmer* determined that a person "may agree to arbitrate statutory claims," this does not mean "that an employer has a free hand in requiring compulsory arbitration as a condition of employment."<sup>3</sup> Compulsory arbitration differs from a system under which an employee voluntarily agrees to submit a claim to arbitration after the dispute arose.<sup>4</sup> In fact, the language of the Civil Rights Act of 1991 encourages this form of alternative dispute resolution for a discrimination claim.<sup>5</sup> In contrast, compulsory

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1. 500 U.S. 20 (1991).

2. 42 U.S.C. §§ 621-634 (1994). For a detailed discussion of *Gilmer*, see Stuart H. Bompey & Michael P. Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 EMPLOYEE REL. L. J. 197 (1993-94); John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113 (1992); Maria C. Whittaker, *Gilmer v. Interstate: Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination*, 56 ALB. L. REV. 273 (1992).

3. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479-80 (D.C. Cir. 1997).

4. See *id.* at 1472 (stating that compulsory arbitration does not involve "a case in which an employee and an employer, in the face of a legal problem, have made an ad hoc, mutually voluntary decision to pursue arbitration or some other form of alternative dispute resolution in lieu of formal litigation").

5. Section 118 of the Civil Rights Act of 1991 provides: "Where appropriate

arbitration requires an employee, as a condition of employment, to forego all access to a jury trial and use arbitration in place of a judicial forum for resolving statutory and contractual claims. For purposes of this Article, compulsory arbitration is narrowly defined to identify a situation where an employer requires an individual, as a condition of employment, to sign an agreement waiving the right to litigate future claims in a judicial forum in exchange for initial employment, or the opportunity to continue current employment.<sup>6</sup>

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and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration*, is encouraged to resolve disputes arising under the Act or provisions of Federal law amended by this title." Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, *reprinted in* notes to 42 U.S.C. § 1981 (1994) (emphasis added).

6. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1187 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998) (defining compulsory arbitration as "the system under which employers compel their prospective employees as a condition of employment to waive their rights to litigate future employment-related disputes in a judicial forum"). For an example of a compulsory arbitration clause, see *Cole*, 105 F.3d at 1469. In *Cole*, the employer required the plaintiff to sign the following "Pre-Dispute Resolution Agreement:"

In consideration of the Company employing you, you and the Company each agrees that, in the event either party (or its representatives, successors or assigns) brings an action in a court of competent jurisdiction relating to your recruitment, employment with, or termination of employment from the Company, the plaintiff in such action agrees to waive his, her or its right to a trial by jury, and further agrees that no demand, request or motion will be made for trial by jury.

In consideration of the Company employing you, you further agree that in the event that you seek relief in a court of competent jurisdiction for a dispute covered by this Agreement, the Company may, at any time within 60 days of the service of your complaint upon the Company, at its option, require all or part of the dispute to be arbitrated by one arbitrator in accordance with the rules of the American Arbitration Association. You agree that the option to arbitrate any dispute is governed by the Federal Arbitration Act, and fully enforceable. You understand and agree that, if the Company exercises its option, any dispute arbitrated will be heard solely by the arbitrator and not by a court.

As defined, this Article addresses whether the Civil Rights Act of 1991 precludes the compulsory arbitration of Title VII claims. Although numerous commentators have addressed the general issue of compulsory arbitration of employment disputes,<sup>7</sup> this Article focuses on a detailed examination of the impact of the Civil Rights Act of 1991 in this area. The language of the Civil Rights Act of 1991 and the legislative history of the Act<sup>8</sup> provides evidence of Congress' intent to preclude compulsory arbitration of Title VII claims, and waiver of the statutory right to judicial relief for future

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This pre-dispute resolution Agreement will cover all matters directly or indirectly related to your recruitment, employment or termination of employment by the Company; including, but not limited to, claims involving laws against discrimination whether brought under federal and/or state law, and/or claims involving co-employees but excluding Workers Compensation Claims.

The right to a trial, and to a trial by jury, is of value.

YOU MAY WISH TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. IF SO, TAKE A COPY OF THIS FORM WITH YOU. HOWEVER, YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU.

*Id.*

7. See, e.g., Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345 (1998); Michael Delikat & Rene Kathawala, *Arbitration of Employment Discrimination Claims Under Pre-Dispute Agreements: Will Gilmer Survive?*, 16 HOFSTRA LAB. & EMP. L.J. 83 (1998); John-Paul Motley, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Chose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687 (1998); Lucille M. Ponte, *In the Shadow of Gilmer: How Post-Gilmer Legal Challenges to Pre-Dispute Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration*, 12 OHIO ST. J. ON DISP. RESOL. 359 (1997); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996); Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267 (1998); Lynne M. Longtin, Comment, *The EEOC's Position on Mandatory Arbitration*, 67 U. CIN. L. REV. 265 (1998).

8. See discussion *infra* Part IV.

claims of Title VII discrimination. The language and legislative history of the Civil Rights Act of 1991 also indicates that employers may not require employees, as a condition of employment, to waive their right to bring future Title VII claims in court.<sup>9</sup>

Furthermore, the Supreme Court unanimously held in *Alexander v. Gardner-Denver Co.*<sup>10</sup> that a grievance/arbitration clause in a collective bargaining agreement providing for the arbitration of all employment disputes and grievances did not bar a plaintiff from pursuing a Title VII claim and available remedies in federal court.<sup>11</sup> At the time it enacted Title VII, Congress believed that "the federal courts would play a unique and indispensable role in advancing the social policy of deterring workplace discrimination."<sup>12</sup> Prior to 1991, the year of the Court's decision in

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9. See discussion *infra* Part IV.

10. 415 U.S. 36 (1974).

11. See *id.* at 56 ("The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."); see also *McDonald v. City of West Branch*, 466 U.S. 284, 289 (1984) (affirming that *Gardner-Denver* established the principle "that arbitration [can]not provide an adequate substitute for [a] judicial proceeding" in protecting the federal statutory rights provided for in Title VII); *Chandler v. Roudebush*, 425 U.S. 840 (1976) (extending *Gardner-Denver* to cover federal employees).

12. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1187 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998); see also *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("The private litigant who seeks redress for his or her injuries vindicates both the deterren[t] and the compensation objectives of the [anti-discrimination statutes]."); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (declaring that "the federal courts were entrusted with [the] ultimate enforcement responsibility" for Title VII); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting) (stating that federal courts should not defer to arbitration of Title VII claims decided "by the same combination of forces that had long perpetuated invidious discrimination"); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (explaining that judicial relief under Title VII compensates the victim and also addresses the broader public interest in the deterrence of future discrimination); *Gardner-Denver Co.*, 415 U.S. at 45 (1974) (explaining Congress' intent to assign "federal courts [the] plenary powers to secure compliance with Title VII").

*Gilmer* and the enactment of the Civil Rights Act of 1991, courts interpreted the *Gardner-Denver* decision as prohibiting any form of compulsory arbitration for Title VII claims.<sup>13</sup> Although an arbitration clause in a collective bargaining agreement would preclude a plaintiff from pursuing other state and federal claims in court due to the "liberal federal policy favoring arbitration,"<sup>14</sup> courts interpret Title VII claims differently due to Congress' clear intent to preclude binding arbitration.<sup>15</sup> As consistently interpreted by the federal courts prior to *Gilmer*, Congress' intent and the Court's decision in *Gardner-Denver* precluded subjecting Title VII cases to compulsory arbitration.<sup>16</sup> Finally, compulsory arbitration

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13. See *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994) (stating that "[*Gardner-Denver*] was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims"); see also *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), *vacated*, 500 U.S. 930 (1991); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989); *Rosenfeld v. Department of Army*, 769 F.2d 237, 239 (4th Cir. 1985) (identifying the "plain lesson" of *Gardner-Denver* to be the recognition of Congress' entrustment of the final resolution of Title VII claims to federal courts). But see *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-82 (4th Cir. 1996) (holding that employees can be compelled to submit Title VII and ADA claims to binding arbitration pursuant to a grievance arbitration clause in a collective bargaining agreement); cf. *Duffield*, 144 F.3d at 1192 (criticizing the Fourth Circuit's decision for failing to follow Supreme Court precedent, and ignoring the legislative history to the Civil Rights Act of 1991). One court stated:

Although [*Gardner-Denver*] involves a collective bargaining agreement, and not a commercial arbitration agreement under the FAA, this fact should not change the Court's analysis. The *Gardner-Denver* Court was well aware that federal policy favors arbitration. That decision turned not on the fact that a collective bargaining arbitration was involved, but instead on the unique nature of Title VII [claims]

....

We conclude that in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII.

*Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988).

14. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

15. See *Utley*, 883 F.2d at 187.

16. See *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994).



raises concerns due to the imbalance of bargaining power between the employer and employee, and the limitations of the arbitration process.<sup>17</sup> While arbitration can serve as an effective method for resolving employment disputes, the process should be reserved for a truly voluntary agreement when bargained for by a union pursuant to a collective bargaining agreement, or between a non-union employee and employer after a dispute has arisen.

## II. ARBITRATION OF DISCRIMINATION CLAIMS AFTER *GILMER*

The year 1991 proved to be a watershed regarding the arbitration of employment disputes, particularly Title VII claims, due to the Court's decision in *Gilmer* and Congress' enactment of the Civil Rights Act of 1991. In a series of cases beginning with *Alexander v. Gardner-Denver Co.*,<sup>18</sup> the Court expressed consistent disapproval of binding arbitration as a method for resolving statutory employment disputes.<sup>19</sup> When first presented with the issue of the enforcement of an arbitration clause for a discrimination claim, the Court unanimously held that a

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17. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'TS OF LABOR & COMMERCE, REPORT AND RECOMMENDATIONS 29 (Dec. 1994) [hereinafter REPORT AND RECOMMENDATIONS] (on file with *The Wayne Law Review*). This report quotes Judith Lichtman, President of the Women's Legal Defense Fund, who expresses her concern

about the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment . . .

*Id.*

18. 415 U.S. 36 (1974).

19. See *id.*; see also *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); Pierre Levy, Comment, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 456 (1996) (stating that the Court "had generally disfavored binding arbitration as a vehicle for settling non-contractual disputes between an employer and an employee").

grievance/arbitration clause in a collective bargaining agreement providing for the arbitration of all employment disputes did not bar a plaintiff from pursuing a Title VII claim and available remedies in federal court.<sup>20</sup>

In *Gardner-Denver*, the Court reversed the lower court's summary judgment in favor of the company denying the plaintiff's claim of racial discrimination under a collective bargaining agreement. In reversing, the Court distinguished between relief pursuant to binding arbitration under a collective bargaining agreement, and relief permitted by Title VII.<sup>21</sup> The Court confirmed that judicial review of arbitration is limited,<sup>22</sup> but stated that "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process."<sup>23</sup>

Seventeen years later, however, the Court revisited the issue in *Gilmer* outside the context of a collective bargaining agreement. The Court held that an employee's agreement to arbitrate employment-related disputes may require him to arbitrate statutory claims under the ADEA because "[b]y agreeing to arbitrate a statutory claim, [the employee] does not forego the substantive rights afforded by the statute; [the employee] only submits to [his] resolution in an arbitral, rather than a judicial, forum."<sup>24</sup> In so holding, the Court emphasized that "so long as the prospective litigant effectively may vindicate [his] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>25</sup> The Court thus appeared to

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20. See *Gardner-Denver*, 415 U.S. at 59-60.

21. See *id.* at 43.

22. See *id.* at 54 (citing the *Steelworker's Trilogy*: *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960)).

23. *Id.*

24. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

25. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

depart from its reasoning in *Gardner-Denver* without specifically overruling its prior decision, indicating that *Gardner-Denver* applied to collective-bargaining agreements, but ruling that agreements to arbitrate statutory claims outside the collective-bargaining context were enforceable unless Congress had precluded such waivers of judicial remedies.<sup>26</sup> While *Gilmer* can be read as limiting the Court's aversion to arbitration to the collective bargaining context, commentators had viewed the Court prior to *Gilmer* as being opposed to the arbitration of statutory employment disputes.<sup>27</sup>

*A. Gilmer v. Interstate/Johnson Lane Corp.*

When Robert Gilmer was hired by Interstate/Johnson Lane Corporation as Manager of Financial Services in 1981, Interstate required Gilmer to register as a securities representative with the New York Stock Exchange (NYSE) as a condition of employment.<sup>28</sup> The NYSE included a clause, Rule 347, in its registration application and required the applicant to sign Form U-4, whereby the applicant agreed to submit any dispute arising out of his employment with or termination from Interstate/Johnson Lane to binding arbitration.<sup>29</sup> In 1987, the plaintiff was fired at the age of sixty-two.<sup>30</sup> After first filing a complaint with the Equal Employment Opportunity Commission, the plaintiff filed a lawsuit in federal court, alleging violations of the Age Discrimination in Employment Act (ADEA).<sup>31</sup> Relying on Rule 347 of the NYSE registration application and the Federal Arbitration Act (FAA),

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26. See *id.* at 33-35; *Gardner-Denver*, 415 U.S. 36; see also Levy, *supra* note 19, at 457-59 (discussing the relationship between the Court's decisions in *Gilmer* and *Alexander*).

27. See Levy, *supra* note 19, at 456 n.7; Gray, *supra* note 2, at 123 n.9; Note, *Statutory Rights and Predispute Agreements to Arbitrate in Contracts of Employment*, 66 ST. JOHN'S L. REV. 1067, 1072-73 (1993).

28. See *Gilmer*, 500 U.S. at 23.

29. See *id.*

30. See *id.*

31. See *id.* at 23-24; see also 29 U.S.C. §§ 621-634 (1994).

Interstate sought to compel arbitration.<sup>32</sup> In response, the plaintiff claimed that arbitration under the New York Stock Exchange Rules impermissibly hurt his ability to effectively pursue and protect his statutory rights.

First noting the liberal federal policy favoring arbitration,<sup>33</sup> the Court stated that the arbitration agreement was not exempt from coverage under the FAA.<sup>34</sup> The Court rejected the plaintiff's challenge to the impartiality of arbitrators by finding that the Rules provided protections against biased arbitrators, and judicial review under the FAA permitted a court to set aside a decision demonstrating "partiality or corruption in the arbitrators."<sup>35</sup> Second, the plaintiff argued that he would be unfairly hampered in his ability to prove discrimination due to the limited discovery permitted in the arbitration process. The Court rejected this argument because the NYSE Rules provided for discovery, and the simplicity, informality, and speed of the arbitration process makes arbitration a desirable substitute for federal court procedures.<sup>36</sup> Third, the plaintiff argued that public knowledge of discrimination, appellate review, and the development of employment discrimination law would be damaged because arbitrators are not required to issue written awards. The Court rejected this argument because the NYSE Rules required that all arbitration awards be in writing and published.<sup>37</sup> Finally, the Court dismissed the plaintiff's argument that arbitration failed to provide equitable relief because the NYSE Rules did not place any restrictions on the type of relief available.<sup>38</sup>

After examining the ADEA to determine whether Congress had

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32. See *Gilmer*, 500 U.S. at 24; see also 9 U.S.C. §§ 1-307 (1994) (discussed *infra* Part V).

33. See *Gilmer*, 500 U.S. at 25; see also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (recognizing the federal policy favoring arbitration in a commercial case).

34. See *Gilmer*, 500 U.S. at 25 n.2.

35. *Id.* at 30-31 (quoting 9 U.S.C. § 10(b) (1994)).

36. See *id.* at 31.

37. See *id.* at 31-32.

38. See *id.* at 32.

expressed an intent to preclude the arbitration of ADEA claims, the Court stated that nothing in the provisions of the ADEA "or its legislative history preclude[d] arbitration."<sup>39</sup> Furthermore, the jurisdiction of the EEOC would not be undermined by enforcement of the arbitration agreement because the agency was vested with "independent authority to investigate age discrimination."<sup>40</sup> Based on an implied presumption in favor of arbitration in the absence of contrary congressional intent, the Court declared that the arbitration process did not deprive a claimant of substantive rights.<sup>41</sup>

The Court also dismissed the plaintiff's challenges to the arbitration process, and the claim "that arbitration panels [could] be biased."<sup>42</sup> Even assuming unequal bargaining power, the parties "[m]ere inequality in bargaining power . . . [was] not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."<sup>43</sup> Despite affirming the policy favoring arbitration, the Court indicated that it would not enforce binding arbitration in the case of fraud or coercion.<sup>44</sup>

Although failing to address the similarities or differences between the ADEA and Title VII, the Court distinguished *Gardner-Denver* on the ground that it involved a collective bargaining agreement rather than an individual agreement to arbitrate.<sup>45</sup> The Court reasoned that "[a]lthough all statutory claims may not be appropriate for arbitration,"<sup>46</sup> individual agreements to arbitrate ADEA claims should be interpreted in a similar fashion as other arbitration agreements, "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>47</sup> Because the plaintiff in *Gilmer* argued only that

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39. *Id.* at 26.

40. *Id.* at 28.

41. *See id.* at 26.

42. *Id.* at 30.

43. *Id.* at 33.

44. *See id.*

45. *See id.* at 36.

46. *Id.* at 26.

47. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

there was an inherent conflict between the ADEA and arbitration, the Court did not examine the text of the Act or the legislative history of the ADEA. Thus, the Court affirmed the enforcement of the requirement to arbitrate age discrimination claims brought under the ADEA, finding no congressional intent to preclude the waiver of judicial remedies for such claims or inherent conflict between the Act's underlying purposes and arbitration.<sup>48</sup> Based on this reasoning, one may infer from *Gilmer* that reliance on the Court's previous decisions interpreting arbitration as being generally inconsistent with the purposes of Title VII is an insufficient basis to "show . . . that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act."<sup>49</sup> Rather than relying on a general inconsistency with the purposes of Title VII and arbitration, a plaintiff must demonstrate that "Congress intended to preclude" the arbitration of claims under the Act as demonstrated by the text of the statute and legislative history.<sup>50</sup>

*B. Arbitration of Discrimination Claims After Gilmer and the Civil Rights Act of 1991*

Although the Court "declin[ed] to find either fraud or coercion in" *Gilmer*, the Court identified them as possible grounds to challenge the arbitration agreement's validity.<sup>51</sup> In addition, a plaintiff could demonstrate that the text and legislative history of a statute indicated Congress' intent to preclude the arbitration of such claims.<sup>52</sup>

Section 118 of the Civil Rights Act of 1991 provides: "Where appropriate and to the extent authorized by law, the use of

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473 U.S. 614, 628 (1985) (internal quotations omitted)).

48. See *id.*

49. *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992).

50. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998).

51. *Levy*, *supra* note 19, at 459.

52. See *Gilmer*, 500 U.S. at 24-26.

alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title . . . .”<sup>53</sup> Although Chief Judge Posner of the Seventh Circuit has termed this provision “a polite bow to the popularity of ‘alternative dispute resolution,’”<sup>54</sup> some argue that the language of this section evinces a congressional intent to “encourage” and “authorize” the use of compulsory arbitration for all employment discrimination claims.<sup>55</sup> The Act also provides for jury trials, and compensatory and punitive damages.<sup>56</sup>

Following the enactment of the Civil Rights Act of 1991, courts have generally held that plaintiffs who fail to “knowingly” agree to arbitrate a Title VII claim cannot be required to submit the claim to binding arbitration.<sup>57</sup> In contrast, however, a plaintiff who voluntarily initiates binding arbitration of a discrimination claim is bound by the arbitrator’s decision.<sup>58</sup> Despite the provision for the right to a jury trial in the 1991 Act, federal courts have rejected the argument that such a provision demonstrates Congress’ intent to

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53. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, *reprinted in* notes to 42 U.S.C. § 1981 (1994).

54. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997).

55. The district courts that have addressed this question are divided. *Compare* *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 201-02 (D. Mass. 1998) (holding that the language of the Civil Rights Act of 1991 precludes compulsory arbitration of Title VII claims under Form U-4), *with* *EEOC v. Frank’s Nursery & Crafts, Inc.*, 966 F. Supp. 500, 504 (E.D. Mich. 1997) (holding that a provision requiring the compulsory arbitration of “Title VII claims, notwithstanding the legislative history of [the 1991 Act], do[es] not violate federal law or policy”), *and* *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) (holding that the 1991 Act did not preclude compulsory arbitration of Title VII claims despite noting and dismissing contrary language in the Act’s legislative history).

56. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1073 (1991) (codified as amended in scattered sections of 42 U.S.C.).

57. *See, e.g., Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

58. *See* *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) (stating that “[o]nce a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority”).

permit a claimant from avoiding binding arbitration that the claimant voluntarily initiated.<sup>59</sup> Yet, the voluntary initiation of binding arbitration and the enforceability of the arbitrator's decision differs significantly from the enforceability of compulsory arbitration required as a condition of employment that requires an employee to forego the statutory right to judicial relief from discrimination by submitting future claims to binding arbitration.

Despite the Court's apparent limitation of the *Gilmer* holding to the specific facts of the case, in recent years the lower courts have expanded on this ruling, with some commentators arguing that the rulings in the lower courts following *Gilmer* have "abrogated statutory-created employment rights."<sup>60</sup> Following passage of the Civil Rights Act of 1991, several federal courts found that compulsory arbitration was permitted under Title VII prior to the 1991 amendments.<sup>61</sup> Because the 1991 Civil Rights Act can be viewed as simply an amendment to Title VII, it has been argued that the same reasoning applies so as to not preclude compulsory arbitration.<sup>62</sup> Federal courts have generally compelled arbitration of a statutory claim when the employee knowingly and voluntarily signed an agreement to arbitrate employment claims with the employer.<sup>63</sup> Similarly, two decisions arising under the Americans

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59. See, e.g., *id.* at 1441.

60. Levy, *supra* note 19, at 455; see also Bompey & Pappas, *supra* note 2, at 201; Gray, *supra* note 2, at 119.

61. See, e.g., *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

62. See, e.g., *Hurst v. Prudential Sec., Inc.*, 21 F.3d 1113, 1114-15 (9th Cir. 1994) (rejecting the argument that the language of the 1991 Act required a different result than previous Title VII arbitration cases); *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299 (D.C. App. 1994); *Lockhart v. A.G. Edwards & Sons, Inc.*, No. CIV.4.93-2418-GTV, 1994 WL 34870, at \*4 (D. Kan. Jan. 25, 1994) (rejecting the plaintiff's argument that the "committee report[s] are sufficient to establish Congressional intent to preclude a waiver of . . . judicial remed[ies] in Title VII cases").

63. See, e.g., *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997)



with Disabilities Act (ADA), which has an arbitration section similar to the provision in the Civil Rights Act of 1991, adopted the argument that the language of the statute encouraged and authorized the compulsory arbitration of all employment discrimination claims.<sup>64</sup> The First Circuit, in a case involving neither an employment agreement nor a compulsory waiver, concluded that the explicit language of the ADA allows the enforcement of a voluntary prospective agreement to arbitrate an ADA claim against a school.<sup>65</sup> In the second case, which did involve an employment contract, the Fifth Circuit enforced a voluntary arbitration agreement, holding that the plain language of the ADA refutes the argument that "Congress did not intend for arbitration clauses to prevent individuals from bringing suit for alleged ADA violations."<sup>66</sup> It is important to note, however, that the federal decisions favoring arbitration of Title VII claims were decided prior to the enactment of the 1991 Amendments,<sup>67</sup> and courts have cited those decisions as authority without fully considering the impact of the Civil Rights Act of 1991.<sup>68</sup>

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(requiring arbitration of a Title VII claim after the employee signed the back page of an employment handbook imposing arbitration); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (compelling arbitration of a sexual harassment claim when the employee signed an arbitration agreement in the job application and a detailed arbitration agreement after commencing employment); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997) (enforcing arbitration of a Title VII claim pursuant to a compulsory arbitration agreement); *Nghiem*, 25 F.3d at 1437 (compelling arbitration of a Title VII claim pursuant to a provision in an employee handbook).

64. See *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 148-50 (1st Cir. 1998); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 217-18 (5th Cir. 1997).

65. See *Bercovitch*, 133 F.3d at 148-50.

66. *Miller*, 121 F.3d at 218.

67. For example, *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991), was decided on August 2, 1991.

68. See, e.g., *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994).

### III. ENFORCEMENT OF COMPULSORY ARBITRATION AGREEMENTS UNDER THE FEDERAL ARBITRATION ACT

Congress originally enacted the Federal Arbitration Act in 1925, and then re-enacted and codified it as Title IX of the United States Code in 1947. The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts."<sup>69</sup> The Supreme Court has articulated a clear standard regarding the enforceability of an arbitration agreement under the FAA: "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>70</sup> The "text of the [Act], its legislative history, or an 'inherent conflict' between arbitration and the [Act's] underlying purposes will demonstrate the existence of such an intention."<sup>71</sup>

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>72</sup> Section 1 of the FAA, however, provides an important exception, stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>73</sup> While litigants have argued that section 1 exempts all contracts of employment that facilitate or affect commerce from the provisions of section 2, the federal courts of appeals have consistently found that section 1 of the FAA exempts only the employment contracts

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69. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

70. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

71. *Gilmer*, 500 U.S. at 26; *accord Mitsubishi*, 473 U.S. at 628; *see also* *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("[A]ll presumptions used in interpreting statutes . . . may be overcome by specific language or specific legislative history that is a reliable indicator of legislative intent.").

72. 9 U.S.C. § 2 (1994).

73. 9 U.S.C. § 1 (1994).

of workers engaged in the movement of goods in interstate commerce.<sup>74</sup>

Courts base this interpretation of section 1 on two well-established canons of statutory construction. The first states that a court should "avoid a reading [of statutory language] which renders some words altogether redundant."<sup>75</sup> Based on this canon, extending the end clause of section 1 ("any other class of workers engaged in foreign or interstate commerce") to all workers whose employment has any impact on commerce would render the specific exclusion for seamen and railroad workers unnecessary.<sup>76</sup> If Congress sought to create a broad exclusion for all employment contracts, Section 1

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74. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) (stating that section 1's exclusion "covers only those workers actually involved in the 'flow' of commerce, i.e., those workers responsible for the transportation and distribution of goods"); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (stating that section 1 exempts only contracts of employment for workers actually engaged in the movement of goods and commerce); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) (explaining that section 1 "should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce"); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984) (applying section 1 only "to workers employed in the transportation industries"); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (applying section 1 "only to those actually in the transportation industry"); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971) (limiting application of section 1 to employees "involved in, or closely related to, the actual movement of goods in interstate commerce"); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (applying section 1 only to workers "who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"). *But see United Elec. Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954) (questioning, in dicta, the narrow interpretation of section 1).

75. *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

76. See *Cole*, 105 F.3d at 1470; see also *Rojas*, 87 F.3d at 748 ("It is quite impossible to apply a broad meaning to the term 'commerce' in Section 1 and not rob the rest of the exclusion clause of all significance.") (quoting *Albert v. National Cash Register Co.*, 874 F. Supp. 1324, 1327 (S.D. Fla. 1994)).

could have simply stated "nothing herein shall apply to contracts of employment."<sup>77</sup>

The second canon, *ejusdem generis*, "limits general terms which follow specific ones to matters similar to those specified."<sup>78</sup> Under this canon, the phrase "any other class of workers engaged in foreign or interstate commerce" is limited by the specific terms preceding it, namely "seamen" and "railroad employees." Thus,

under the rule of *ejusdem generis*, [it] include[s] only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.<sup>79</sup>

Two Supreme Court decisions also provide support for this interpretation of the exclusionary clause in section 1 of the FAA. First, in a case involving the interpretation of section 2 of the FAA, the Court contrasted the phrase "involving commerce" in section 2 with the term "in commerce" in section 1, stating: "The initial interpretative question focuses upon the words 'involving commerce.' These words are broader than the often-found words of art 'in commerce.' They therefore cover more than "only persons or activities within the flow of interstate commerce."<sup>80</sup> The Court's analysis thus indicates that section 1's exclusion is limited to those workers actually involved in the "flow" of

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77. *Cole*, 105 F.3d at 1471.

78. *Gooch v. United States*, 297 U.S. 124, 128 (1936); *accord Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980).

79. *Asplundh*, 71 F.3d at 598 (quoting *Tenney Eng'g, Inc.*, 207 F.2d at 452).

80. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (quoting *United States v. American Bldg. Maint. Indus.*, 422 U.S. 271, 276 (1975) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the generation of goods and services for interstate markets and their transport and distribution to the consumer"))); *see also FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351 (1941).

commerce, specifically those workers responsible for the transportation and distribution of goods.<sup>81</sup>

Furthermore, the Supreme Court in *Gilmer* enforced an agreement to arbitrate all employment-related claims entered into as a condition of employment.<sup>82</sup> Although the Court did not discuss the scope of section 1 of the FAA, and did not examine the agreement as an employment contract, the Court's enforcement of the agreement implies that the Court would likely agree with the interpretation of section 1 followed by the lower federal courts.<sup>83</sup> As suggested by Justice Stevens in his dissent in *Gilmer*, "if the FAA actually excluded all employment contracts from the enforcement provisions of the FAA, it would be anomalous to compel arbitration of *Gilmer's* employment claims simply because the arbitration agreement was not formally part of a 'contract for employment.'"<sup>84</sup> In conflict with this interpretation, one court has argued that the legislative history of section 1 of the FAA shows a congressional intent to exclude all contracts of employment from FAA coverage.<sup>85</sup> Yet under the Court's test for enforcement of an arbitration agreement pursuant to the FAA, the statutory language and legislative history of the Civil Rights Act of 1991 presents a consistent congressional intent to prohibit the waiver of judicial remedies and procedures imposed as a condition of employment.

#### IV. LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1991

In enacting the Civil Rights Act of 1991, Congress principally focused on overruling hostile Supreme Court decisions in order to make discrimination claims easier to bring and prove in federal

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81. See *Cole*, 105 F.3d at 1472.

82. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23-25 (1991).

83. See *id.* at 25 n.2.

84. *Cole*, 105 F.3d at 1472 (citing *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting)).

85. See *Gilmer*, 500 U.S. at 39-40 (Stevens, J., dissenting); see also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (analyzing the history of the FAA and its interpretation).

courts, and also to substantially increase the available procedural rights and remedies.<sup>86</sup> The Civil Rights Act of 1991 had two main goals. First, Congress "restore[d] . . . civil rights laws" by "overruling" several 1989 Supreme Court decisions that, in the view of Congress, represented a narrow and restrictive reading of the language and purposes of Title VII.<sup>87</sup> Second, Congress sought to make it easier to bring and prove such claims, while also increasing the available remedies in order to fully compensate a plaintiff for injuries caused by unlawful discrimination, thus providing a right to compensatory and punitive damages and a jury trial for certain violations.<sup>88</sup>

With the passage of the 1991 Act, Congress directed that Title VII should be read broadly to best effectuate the remedial purposes of the Act, so that when the statutory terms in Title VII "are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose [of the Act]."<sup>89</sup> One of the important purposes of the 1991 Act was to increase the possible remedies

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86. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Library of Congress v. Shaw*, 478 U.S. 310 (1986); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994) (listing the Supreme Court decisions and Congress' response in the 1991 Act).

87. See H.R. REP. NO. 102-40(I), at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 549; see also *Landgraf*, 511 U.S. at 250-51 (listing the Supreme Court decisions); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1191 (9th Cir. 1998), cert. denied, 119 S. Ct. 445 (1998).

88. See 42 U.S.C. § 1981(a) (1994); H.R. REP. NO. 102-40(I), at 30 (1991); H.R. REP. NO. 102-40(II), at 1-4 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 694-96; see also H.R. REP. NO. 102-40(I), at 72 (emphasizing that juries should decide the damages issues because "[t]he jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee").

89. H.R. REP. NO. 102-40(I), at 88; see also *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (stating that civil rights statutes should be broadly construed).

available for a civil rights claimant.<sup>90</sup> As stated by Congress, the "primary purpose" was "to strengthen existing protections and remedies available [under Title VII]."<sup>91</sup> Based on this language, it would appear to be "at least a mild paradox"<sup>92</sup> to conclude that Congress "encouraged" compulsory arbitration in which an employer conditions employment on an employee's surrendering of the right to a judicial forum for all future discrimination claims.<sup>93</sup> Such an interpretation would also be at odds with the other types of alternative dispute resolution "encouraged" in the Act, including "settlement negotiations, conciliation, facilitation, mediation, factfinding, [and] mini-trials," which are all consensual.<sup>94</sup>

Rather than presenting a voluntary option for resolving a dispute, a compulsory arbitration agreement provides a take-it or leave-it offer for an applicant or employee, and forces the individual to either agree to arbitrate any future employment disputes or seek another job.<sup>95</sup> This Hobson's choice directly conflicts with section 118 of the Civil Rights Act of 1991, which was intended to aid in the deterrence of employment discrimination by increasing a plaintiff's choice of available forums for resolving the dispute rather than limiting them to one non-judicial option.<sup>96</sup> In *Gilmer*, the

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90. See *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994).

91. H.R. REP. NO. 102-40(II), at 1.

92. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997).

93. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1193 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998).

94. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081, § 118 (1991), *reprinted in* notes to 42 U.S.C. § 1981 (1994); *see also* *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 n.11 (1995) (stating that, if possible, a string of terms in a statute should be read consistently so that they "reflect . . . the broad purpose of the Act").

95. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) (stating that "mandatory arbitration is often imposed as a condition of employment, without any consent or bargaining . . . [and] [t]hus, mandatory arbitration agreements operate as the new yellow dog contracts of the 1990s").

96. See *Duffield*, 144 F.3d at 1198; *cf. Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 150 (1st Cir. 1998) (enforcing an arbitration agreement between parents

Court stated that "[h]aving made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>97</sup> While federal courts have allowed the enforcement of compulsory arbitration clauses, it can be argued that the employee has not "made the bargain to arbitrate"<sup>98</sup> when the clause is unilaterally imposed by the employer as a condition of employment.

In contrast to the enforcement of a compulsory arbitration clause, the legislative history of the 1991 Act does not indicate that Congress intended to preclude an employee from voluntarily agreeing to submit a Title VII claim to arbitration after it has arisen. As the Act indicates, plaintiffs are "encouraged" to resolve an employment dispute by such a procedure, and if the employee voluntarily chooses arbitration as an alternative, the employee will be bound by the arbitrator's decision.<sup>99</sup> An employee may thus independently determine that arbitration is a preferable method for resolution of the dispute as opposed to lengthy and expensive litigation.

The EEOC agrees that the language and legislative history of the Civil Rights Act of 1991 evidences Congress' express intent to prohibit the compulsory arbitration of Title VII claims, and distinguishes Title VII claims after passage of the Act in 1991 from the pre-1990 ADEA claim found arbitrable by the Court in *Gilmer*. While the EEOC supports the use of arbitration as an alternative method of dispute resolution when there is an existing claim and the parties voluntarily agree to submit the dispute to arbitration, the agency opposes the enforcement of arbitration agreements that

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and a school for an ADA claim because of its "voluntary" nature, although suggesting that "involuntary" agreements or an agreement in which an individual had no "influence over" would be unenforceable).

97. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

98. *Id.*

99. See *Duffield*, 144 F.3d at 1199; *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994).



require an individual to agree in advance to submit future claims to arbitration as a condition of initial or continued employment.<sup>100</sup>

*A. The Statutory Language of the Civil Rights Act of 1991 Encourages the Use of Voluntary Rather Than Compulsory Arbitration*

The text of section 118 first appeared verbatim in the proposed Civil Rights Act of 1990. Both houses of Congress passed the legislation, but President Bush vetoed the Act due to his concerns with other provisions. The House Conference Report explained the effect of the provision by stating that "any agreement to submit disputed issues to arbitration . . . in any employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."<sup>101</sup> Section 118 of the Civil Rights Act of 1991 includes identical language to encourage the voluntary arbitration of discrimination claims, stating:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act or provisions of Federal law amended by this title.<sup>102</sup>

When interpreting a statute, a court must not be guided by "a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."<sup>103</sup> Furthermore, a court should "consider not only the bare meaning of the word, but

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100. See *EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, No. 915.002 (July 10, 1997) <<http://www.eeoc.gov/docs/mandarb.txt>>.

101. H.R. CONF. REP. NO. 101-755, at 20 (1990).

102. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081, § 118 (1991) (codified as amended in scattered sections of 42 U.S.C.).

103. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986))).

also its placement and purpose in the statutory scheme.”<sup>104</sup> In section 118 of the Act, Congress directly addressed the use of arbitration for settling Title VII claims, stating that the parties could, “[w]here appropriate and to the extent authorized by law,” choose to pursue alternative methods of dispute resolution, including arbitration, to settle a Title VII dispute.<sup>105</sup> The language in the Act, “[w]here appropriate and to the extent authorized by law” provides the section’s substantive limitations and must be read in the context of the objectives and policies of the Act.<sup>106</sup> Therefore, a court should presume that Congress’ use of the qualifiers “where appropriate” and “to the extent authorized by law” in section 118 of the Act provide separate and well-defined limitations on the use of the arbitration process to resolve Title VII claims.<sup>107</sup> At a minimum, the limiting phrase “where appropriate” refutes the argument that “to the extent authorized by law” should be interpreted as an expression of Congress’ intent to either encourage all forms of arbitration or encourage the use of arbitration under all conditions and circumstances that might otherwise be lawful.<sup>108</sup> Instead, the phrase “where appropriate” should be interpreted as indicating a Congressional intent to encourage the use of arbitration for the resolution of discrimination claims only under circumstances or conditions deemed both legally permissible and appropriate. Congress’ use of the word “encouraged” simply means that Congress was encouraging parties to arbitrate disputes within the boundaries contemplated by the Act. It would be a gross mischaracterization of Congress’ intent to interpret the use of the

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104. *Bailey v. United States*, 516 U.S. 137, 145 (1995).

105. See Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1081, § 118 (1991), *reprinted in* notes to 42 U.S.C. § 1981 (1994).

106. See *id.*; *John Hancock*, 510 U.S. at 94-95; *Duffield v. Robertson Stephens Co.*, 144 F.3d 1182, 1193 (9th Cir. 1998); see also *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 698 (1995) (stating that courts should be “reluctan[t] to treat statutory terms as surplussage”); *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 837 n.11 (1988) (citing cases holding same).

107. See *Bailey*, 516 U.S. at 146 (“assum[ing] that Congress used two terms because it intended each term to have a particular, non-superfluous meaning”).

108. See *Duffield*, 144 F.3d at 1194.

word "encourage" as a declaration in favor of arbitration without regard for the rights of the individual that the Act was created to protect.<sup>109</sup>

Examined in isolation, the phrase "where appropriate" provides little assistance as to the circumstances Congress deemed arbitration to be "appropriate."<sup>110</sup> The purposes and objectives of the Civil Rights Act of 1991, however, indicate a congressional intent to expand employees' rights and remedies available under Title VII, so the phrase "where appropriate" should be interpreted as meaning when arbitration serves to further goals of the Act to provide victims of discrimination the opportunity to select a desirable alternative forum for the claim that provides the full array of protections and remedies, but not to force an undesirable forum upon the victim.<sup>111</sup>

Although the qualifying phrase "to the extent authorized by law" cannot be precisely defined, it can be interpreted as a codification of the "law" as Congress understood it at the time the passage was either drafted or enacted.<sup>112</sup> Interpretation of such an imprecise phrase requires initially examining the statute to determine Congress' perception of the existing law that it was shaping or reshaping.<sup>113</sup> At the time Congress drafted section 118 and it was reported out of the House Education and Labor Committee, courts held compulsory arbitration agreements to arbitrate Title VII claims to be unenforceable.<sup>114</sup> Thus, application

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109. See *id.* at 1193.

110. See AMERICAN HERITAGE DICTIONARY 122 (2d ed. 1985) (defining "appropriate" as "[s]uitable for a particular person, condition, occasion, or place; proper; fitting").

111. See *Duffield*, 144 F.3d at 1194; see also *John Hancock*, 510 U.S. at 94-95 (stating that in construing the language of a statute, a court should be guided by the object and policy of the whole law); *United States v. Qualls*, 140 F.3d 824, 826 (9th Cir. 1998), *vacated and remanded*, 119 S. Ct. 398 (1998).

112. See *Duffield*, 144 F.3d at 1194.

113. See *Thompson v. Thompson*, 484 U.S. 174, 180 (1988); see also *Brown v. General Servs. Admin.*, 425 U.S. 820, 828 (1976) (applying this principle to Title VII amendments).

114. See *McDonald v. City of West Branch*, 466 U.S. 284, 289 (1984);

of this principle to the qualifying language "to the extent authorized by law" demonstrates that a compulsory agreement to arbitrate future Title VII claims is not "authorized by law."

While it must be recognized that the Court adopted a "liberal federal policy favoring arbitration agreements . . . ."<sup>115</sup> in the non-discrimination context, this policy in favor of arbitration agreements was based on the assumption that such an agreement was a "freely negotiated choice-of-forum clause [ ]."<sup>116</sup> In addition, the federal courts of appeals, at the time section 118 of the Civil Rights Act of 1991 was drafted and reported out of the House Education and Labor Committee, had, without exception, "widely interpreted" Title VII as "prohibiting any form of compulsory arbitration," including individual employment cases.<sup>117</sup> Since the Court's decision in *Gilmer* had not yet been decided at the time section 118 was drafted and set forth by the House Education and Labor Committee, it can be assumed the state of the law referred to in the phrase "to the extent authorized by law" reflected the consensus of the lower courts because the Court had not spoken to the contrary.<sup>118</sup>

### *B. Relationship Between Gilmer and the Civil Rights Act of 1991*

Because the Court decided *Gilmer* shortly before the official

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Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974).

115. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

116. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (stating that "nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate"); *see also, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989) (upholding the enforcement of an arbitration agreement because it "broadened" the plaintiff's right to choose a forum to resolve the dispute); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (stating "[a]rbitration under the [FAA] is a matter of consent, not coercion").

117. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1303 (9th Cir. 1994); *see Duffield*, 144 F.3d at 1194.

118. *See Thompson*, 484 U.S. at 180; *Duffield*, 144 F.3d at 1194.

enactment of the Civil Rights Act of 1991, it can be argued that section 118 of the Act intended to codify the *Gilmer* decision. It must be remembered, though, that *Gilmer* involved the application and enforcement of an arbitration clause under the ADEA, and did not address any comparison between Title VII and the ADEA.<sup>119</sup> While the ADEA and Title VII share similar substantive provisions, the remedial and procedural provisions of the ADEA were originally modeled after the Fair Labor Standards Act (FLSA)<sup>120</sup> rather than Title VII.<sup>121</sup> Because of the crucial differences between the two statutes, the Supreme Court has held that an attempt to divine congressional intent by comparing the ADEA and Title VII is erroneous.<sup>122</sup> Thus, while the phrase "to the extent authorized by law" could be read as applicable to the substantive provisions of Title VII due to the similarities with the ADEA and the Court's decision in *Gilmer*, the phrase should be read in the context of the other qualifying phrase and in light of the objectives and purposes of the Civil Rights Act of 1991, so as to refer to the *Gardner-Denver* line of cases rather than *Gilmer*.<sup>123</sup>

In addition, following the grant of certiorari in *Gilmer*,<sup>124</sup> Congress amended the ADEA to provide that any waiver of rights under the Act must be "knowing and voluntary," including the

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119. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

120. 29 U.S.C. §§ 201-219 (1994).

121. See *Lorillard v. Pons*, 434 U.S. 575, 578-84 (1978); see also *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357-58 (1995) (noting that despite the enforcement of the ADEA being transferred to the EEOC, the procedural provisions of the ADEA follow the FLSA, and are distinct from the procedural provisions for Title VII).

122. See *Lorillard*, 434 U.S. at 584-85.

123. See *Duffield*, 144 F.3d at 1195.

124. The Older Workers Benefit Protection Act of 1990 (OWBPA) was passed prior to the Court's decision in *Gilmer*, but the arbitration agreement in *Gilmer* was not subject to the Act because the claim in the case arose prior to the enactment of the OWBPA. See Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 984, § 202 (1990) (stating that the waiver provisions of the Act "shall not apply with respect to waivers that occur before the date of enactment of this Act").

right to a jury trial.<sup>125</sup> The Older Workers Benefit Protection Act of 1990 (OWBPA) was passed to ensure that employees "are not coerced or manipulated" into waiving their rights under the ADEA.<sup>126</sup> A waiver of "rights or claims that may arise after the date the waiver is executed" is not considered knowing and voluntary.<sup>127</sup> Congress was particularly concerned with the "preemptive waiver of rights [that] occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination."<sup>128</sup> This amended language was not considered by the Court in *Gilmer*.<sup>129</sup> Furthermore, although Congress enacted the Civil Rights Act of 1991 after the Court's decision in *Gilmer*, Section 118 was drafted and reported out by the House Education and Labor Committee prior to *Gilmer*, and repeated verbatim the language of the Civil Rights Act of 1990 vetoed by President Bush.<sup>130</sup>

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125. 29 U.S.C. § 626(f) (1994); *see also* 29 U.S.C. § 626c (1994); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 983, § 201 (1990); *Oubre v. Entergy Operations, Inc.*, 118 S. Ct. 838, 841 (1998). Congress stated that the loss of the right to a jury trial was the principal justification for adopting a limitation on the waiver of ADEA rights. *See* S. REP. NO. 101-79, at 12-13 (1989).

126. S. REP. NO. 101-263, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1510; *see also* S. REP. NO. 101-79, at 13; H.R. REP. NO. 101-664, at 24 (stating that the OWBPA was passed due to the concern that older workers could be "coerced into signing away their ADEA protections").

127. 29 U.S.C. § 626(f)(1)(C).

128. S. REP. NO. 101-79, at 9, *incorporated by reference in* S. REP. NO. 101-263, at 15, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1520.

129. Although the Court made a passing reference to the OWBPA, it did not address the effect of the Act on compulsory arbitration agreements. *See Gilmer*, 500 U.S. at 28-29 n.3. *But see Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) (suggesting that the OWBPA should not be interpreted to cover the waiver of a "judicial forum" because "[t]here is no indication that Congress intended the OWBPA to affect agreements to arbitrate employment disputes").

130. Note that there was no Senate Committee Report, although another House Committee subsequently approved the identical bill without change. *See* H.R. REP. NO. 102-40(II), at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694.

*C. Legislative History Indicates an Intent Not to Incorporate Gilmer or Authorize Compulsory Arbitration*

The legislative history for section 118 of the Civil Rights Act of 1991 indicates that Congress did not intend to include *Gilmer* within the definition of "authorized by law."<sup>131</sup> Instead, Congress expressed a clear intent not to incorporate the Court's decision in *Gilmer* into the amendments to Title VII, or authorize mandatory arbitration of claims under Title VII.<sup>132</sup> Section 118's legislative history unambiguously demonstrates that Congress' goal was to codify the law in place at the time section 118 was drafted. In fact, the floor statements and Committee reports discussing section 118 clearly reflect Congress' intent that in permitting arbitration only "[w]here appropriate and to the extent authorized by law,"<sup>133</sup> Congress was adopting the *Gardner-Denver* precedent, thus prohibiting the enforcement of a compulsory arbitration clause governing future Title VII claims, rather than the arguable

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131. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1195 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998). Note that some courts and scholars have been critical of using legislative history to discern the meaning of a statutory provision. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring); *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1457-58 (D. Minn. 1996) ("[R]emarks made by individual members of Congress during floor debates typically serve as the least reliable form of legislative history since they not only brim with obvious bias but also remain subject to continuous amendment and supplementation throughout the legislative process."); WILLIAM KEEFE & MORRIS OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 258 (5th ed. 1981) ("[D]ebate is . . . a curious melange of the opening lines of many speeches never heard on the floor, coupled with revised, sometimes totally new, remarks."); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29 (1997) (stating it is "the words, rather than the intent of the legislature, which is the law that must be followed"); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131-32 (1983).

132. See *Duffield*, 144 F.3d at 1195.

133. *Id.* (quoting *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994)).

validation of such an agreement in *Gilmer*.<sup>134</sup> Furthermore, if the statutory language regarding arbitration is perceived to be ambiguous, the "unusual force and clarity" of the legislative history should be dispositive regarding this issue.<sup>135</sup>

Although it can be argued that the Court's decision in *Gilmer* altered the established rules from *Gardner-Denver* and *McDonald v. City of West Branch*,<sup>136</sup> two of the cases on which Congress based its interpretation of the law at the time of the Act's passage, this argument does not alter Congress' expressed intent in section 118. As stated by the Court with regard to the 1964 Civil Rights Act,

[w]hether [Congress'] understanding [of the law] was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act. . . . For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.<sup>137</sup>

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134. While the reports from the congressional committees do not specifically mention *Gilmer*, statements by individual members of the House indicate that they were familiar with the decision. See 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde). In discussing section 118, Representative Hyde stated:

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.

In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.

*Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)); see also Levy, *supra* note 19, at 468 (stating that the legislative history indicates that Congress was preserving *Gardner-Denver* rather than codifying any arguable revisions from *Gilmer*).

135. See *Duffield*, 144 F.3d at 1197.

136. 466 U.S. 284 (1984).

137. *Brown v. General Servs. Admin.*, 425 U.S. 820, 828 (1976) (footnote omitted); see also *Duffield*, 144 F.3d at 1197 (stating that "[w]hen Congress codifies the policy of certain of the Court's holdings, we are bound to follow the dictates of those cases regardless of whether we think they were correctly



Therefore, as long as the statutory language does not run afoul of the Constitution, Congress' intent regarding the statutory language should control.<sup>138</sup>

Statements by key members of Congress during the floor debates provide additional support for this interpretation of section 118, with various members explaining several times that section 118 encouraged arbitration only "where the parties knowingly and voluntarily elect to use these methods."<sup>139</sup> Of significant importance is the statement by Representative Edwards, the Chairman of the House Committee on Education and Labor, who stated on the day immediately prior to passage of the Act that section 118 was "intended to be consistent with . . . *Gardner-Denver*."<sup>140</sup> The Chairman further stated:

This section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights. No approval whatsoever is intended of the Supreme Court's recent decision in [*Gilmer*] . . . , or any application or extension of it to Title VII.<sup>141</sup>

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decided, and regardless of whether they are subsequently limited or overruled").

138. See, e.g., *Duffield*, 144 F.3d at 1198; *Arriaga - Barrientos v. INS*, 937 F.2d 411, 414-15 (9th Cir. 1991) (stating that while a court may be "sympathetic" to a policy argument contrary to a statutory requirement, "[the court] lack[s] the legitimate authority to undermine legitimate congressional will").

139. 137 CONG. REC. S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); see also 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) (explaining that arbitration is only encouraged where "the parties knowingly and voluntarily elect" to submit to the process); H.R. REP. CONF. REP. NO. 101-596, at 1 (1990), reprinted in 1990 U.S.C.C.A.N. 565, 598 [hereinafter ADA Report] (stating that ADR procedures must be "completely voluntary;" under "no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA").

140. 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards).

141. *Id.* No member of Congress argued the contrary view that the bill would permit preclusive effect to be enforced under a compulsory arbitration

Adding additional support to this interpretation of the Act, President Bush stated at the time he signed the Act that "section 118 of the Act encourages *voluntary* agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration."<sup>142</sup> Furthermore, the Committee Minority Report, authored by Representative Hyde, indicates that Congress did not intend to permit agreements to arbitrate discrimination claims as a condition of employment, stating that, because the Act encouraged only "voluntary" agreements, it was "nothing more than an empty promise" to those who wished to encourage arbitration of more Title VII claims.<sup>143</sup>

In deciding arbitration cases, the Court in several decisions has declared that a court must examine the terms of the statute and "its legislative history," as well as the underlying purpose of the statute, in determining whether Congress "evinced an intention to preclude a waiver of judicial remedies" under the particular circumstances at issue.<sup>144</sup> Thus, in determining whether "Congress intended to preclude a waiver of a judicial forum" for claims arising under a statute, the intent may be determined by examining the statutory language or the legislative history, and also by deciding whether any inherent conflict exists between the statutory purposes and arbitration.<sup>145</sup> As demonstrated by the legislative

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agreement. Note, however, that the Fourth Circuit has concluded that Congress did not intend to return to the reasoning in *Gardner-Denver*. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir. 1996). But see *Duffield*, 144 F.3d at 1197 n.14 (criticizing the Fourth Circuit's reasoning).

142. Statement on Signing the Civil Rights Act of 1991, 1991 No. II PUB PAPERS 1504, 1505 (Nov. 21, 1991).

143. H. R. Rep. No. 102-40(II), at 78 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 764; see also *Duffield*, 144 F.3d at 1197 n.15 (stating that "[i]f the arbitration provision had been thought to allow ex ante waivers as a condition of employment, there would have been absolutely no basis for the dissent's vigorous complaints").

144. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); accord *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987).

145. See *Gilmer*, 500 U.S. at 26 (quoting *McMahon*, 482 U.S. at 227); accord

history of the Act, Congress intended to codify the *Gardner-Denver* view regarding compulsory arbitration, and thus proscribe the enforceability of these agreements as related to Title VII claims.<sup>146</sup> In fact, Congress specifically rejected a proposition that would have permitted the enforcement of compulsory arbitration agreements.<sup>147</sup> As stated by the House Committee, the use of such a compulsory arbitration agreement would "force American workers to choose between their jobs and their civil rights."<sup>148</sup> By rejecting the "Republican" proposal, it is evident that Congress intended to prohibit the enforcement of an agreement for the compulsory arbitration of civil rights claims, and instead attempted to encourage only voluntary agreements which do not require an applicant for employment to waive the right to bring a discrimination claim in a judicial forum as a required condition of employment.<sup>149</sup>

When examining legislative history, "the authoritative source for finding the Legislature's intent lies in the Committee Reports

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*Shearson/American Express*, 482 U.S. at 226-27.

146. See *Duffield*, 144 F.3d at 1198.

147. See *id.* at 1198. For example, Congress emphatically rejected a proposal to allow an employer to require and enforce a compulsory arbitration agreement, stating:

H.R. 1 includes a provision encouraging the use of alternative means of dispute resolution to supplement, rather than supplant, the rights and remedies provided by Title VII. The Republican substitute, however, encourages the use of such mechanisms "in place of judicial resolution." Thus, under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including equal opportunity rights. American workers should not be forced to choose between their jobs and their civil rights.

*Id.* at 1196 (citing H.R. REP. NO. 102-40(I), at 104 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 642) (citations omitted).

148. *Id.* at 1198 (citing H.R. REP. NO. 102-40(I), at 104).

149. See *Duffield*, 144 F.3d at 1196; *see also* *Thompson v. Thompson*, 484 U.S. 174, 185 (1987).

on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'<sup>150</sup> This principle should be followed in a situation such as the 1991 Act where the Committee reports were published before Congress' vote on the Bill. As explained by the House Committee on Education and Labor in its report on H. R. 1, the bill that ultimately became the 1991 Act, "the purpose of [section 118] was to increase the possible remedies available to civil rights plaintiffs."<sup>151</sup> Furthermore, this explanation of the intended use of alternative dispute mechanisms in section 118 matches the Conference Report's description of the identical section in the Civil Rights Act of 1990. The Conference Committee explained that "any agreement to submit disputed issues to arbitration . . . in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."<sup>152</sup> Based on these statements, Congress thus intended that the Court's decision in *Gardner-Denver* prohibiting mandatory arbitration of claims under Title VII under a collective bargaining agreement should also apply to compulsory arbitration under any "employment contract."<sup>153</sup>

Although a court may disagree with Congress' stated intent, a court is not free to legislate its own preferences.<sup>154</sup> In determining whether compulsory arbitration is desirable or should be banned,

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150. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

151. *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994).

152. H. R. CONF. REP. NO. 101-755, at 26 (1990).

153. See *Duffield*, 144 F.3d at 1196 (stating that the Conference Reports reflect Congress' conclusion "that *all* such mandatory agreements as conditions of employment were, at the very least, 'inappropriate,' and thus unenforceable").

154. See, e.g., *Brogan v. United States*, 118 S. Ct. 805, 811-12 (1998) (stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so"); *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (stating that "[a court's] task is to give effect to the will of Congress [when] its will has been expressed in reasonably plain terms"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (stating that courts should follow Congress's intent regarding arbitration); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989) (same).

"the proper venue for resolving that issue remains on the floor of Congress."<sup>155</sup> As indicated by the text and legislative history of the Civil Rights Act of 1991, Congress sought to provide the right to a decision by a jury rather than an arbitrator.<sup>156</sup> Congress was concerned with the problem of permitting compensatory and punitive damages for race discrimination under § 1981, but disallowing such remedies for other claims of discrimination under Title VII.<sup>157</sup> As demonstrated by the legislative history of the 1991 Act, Congress sought to make the same remedies available to plaintiffs under Title VII as to victims claiming race discrimination under § 1981.<sup>158</sup> The House Judiciary Committee agreed that the "1991 amendments were an attempt to provide parity in remedies where discrimination other than race exists."<sup>159</sup> Similarly, the House Committee on Education and Labor stated:

Strengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination. . . .<sup>160</sup>

Deterrence in a public forum, with victims acting as "private

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155. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 964 (1998).

156. See Levy, *supra* note 19, at 466; see also Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994) (providing a summary of the negotiations leading to the 1991 amendments).

157. See Levy, *supra* note 19, at 466-467.

158. See Levy, *supra* note 19, at 467 (citing H.R. REP. NO. 102-40 (I), at 64-65, 74 (1991), reprinted in 1991 U.S.C.C.A.N. 553, 556, 602-03, 612 (report of the House Committee on Education and Labor) (stating that in providing for damages the House applied the "same standards courts have applied under § 1981"))).

159. H. R. REP. NO. 102-40 (II), at 24-30 (1991), reprinted in 1991 U.S.C.C.A.N. 717-23 (report of the House Committee on the Judiciary).

160. H.R. REP. NO. 102-40 (I), at 64-65 (1991) (report of the Education and Labor Committee).

attorneys general" was an important Congressional goal so the statute could be enforced for the "benefit of all Americans."<sup>161</sup>

The text and legislative history of the 1991 amendments discourages a broad application of the *Gilmer* rule. As the language of section 118 indicates, arbitration is "encouraged" as an "alternative means of dispute resolution" "[w]here appropriate and to the extent authorized by law," but arbitration is not mandated.<sup>162</sup> It would be inconsistent for Congress to provide the right to jury trials and allow for compensatory and punitive damages in one section of the Act, and in another section of the same statute permit an employer to impose a compulsory arbitration clause that detracts from or eliminates those same remedies and procedures.<sup>163</sup> Furthermore, it must be noted that a Title VII plaintiff is bound by an unfavorable arbitration award after voluntarily initiating an arbitration proceeding, and is barred from later seeking to litigate the claim in federal court.<sup>164</sup> The House Committee on Education and Labor report supports this interpretation:

The use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII [in *Gardner-Denver*]. The Committee does not intend this

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161. 1991 U.S.C.C.A.N. 617.

162. PUB. L. NO. 102-166, § 118, 105 Stat. 1071, 1081 (1991); see also Levy, *supra* note 19, at 468 (stating that "Congress refused, by omission, to compel arbitration under this section").

163. See Levy, *supra* note 19, at 468 (stating that "[a] more harmonious interpretation of the whole of the 1991 amendment shows that Congress intended for arbitration and jury trials to co-exist, with the right to a jury trial, if not paramount, than at least fully available to claimants").

164. See *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1439-41 (9th Cir. 1994).

section to be used to preclude rights and remedies that would otherwise be available.<sup>165</sup>

Furthermore, the Education and Labor Committee, in opposition to compulsory arbitration clauses as a condition of employment and a proposed Republican minority substitute proposal, stated:

The Republican substitute . . . encourages the use of such mechanisms 'in place of judicial resolution.' Thus, under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. American workers should not be forced to choose between their jobs and their civil rights.<sup>166</sup>

While the Republican minority was more supportive and "encouraging" of arbitration,<sup>167</sup> even Republicans avoided an endorsement of compulsory arbitration by specifically providing that any agreement to arbitrate must be "knowing and voluntary."<sup>168</sup> While it could be argued that a compulsory

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165. H.R. REP. NO. 102-40 (I), at 97 (report of the House Committee on Education and Labor) (citation omitted).

166. H.R. REP. NO. 102-40 (I), at 104 (report of the House Committee on Education and Labor) (citations omitted).

167. The minority members of the Education and Labor Committee stated in the Committee's report: "Both H.R. 1375 [the minority version of the 1991 Civil Rights Act] and H.R. 1 [the House version] contain provisions for encouraging the use of alternative dispute resolution mechanisms. Given the well-known litigation crisis pervading the judicial system, which will be immeasurably worsened by H.R. 1, there is a desperate need for greater use of [alternative dispute resolution mechanisms]." H.R. REP. NO. 102-40 (I), at 156.

168. H.R. REP. NO. 102-40 (I), at 156; *see also* Levy, *supra* note 19, at 469 (quoting this section).

arbitration clause is still a knowing and voluntary agreement on the part of an employee when imposed as a condition of employment,<sup>169</sup> this argument appears to contradict the plain intent expressed by members of Congress, including arbitration's most earnest supporters.<sup>170</sup> It can be also be argued that Congress, in its reliance on *Gardner-Denver*, merely intended to preclude the use of an adverse arbitration decision as a bar to a Title VII claim in federal court. The language and quoted material from the legislative history of the Act, however, indicates that Congress instead intended that Title VII plaintiffs should have the right to bring a claim directly in federal court and not be forced to submit to compulsory arbitration.<sup>171</sup>

#### V. THE ARBITRATION PROCESS AND TITLE VII

The Court's decision in *Gilmer* does not support the idea that an arbitration agreement will be enforceable no matter what rights are waived or what burdens are imposed.<sup>172</sup> For example, an

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169. See *Kinnebrew v. Gulf Ins. Co.*, No. 3:94-CV-1517-R, 1994 WL 803508, at \*1 (N.D. Tex. Nov. 28, 1994) (stating that federal law claims could be "subjected to compulsory arbitration" and that the arbitration procedure did not deprive a plaintiff of substantive rights because statutory claims were arbitrable unless Congress "evinced an attention to preclude waiver of judicial remedies for the statutory rights at issue") (citing *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991))); *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104 (D. Minn. 1993) (rejecting plaintiff's argument that a unilaterally imposed arbitration clause was a contract of adhesion).

170. See *Levy*, *supra* note 19, at 469 (stating that "[b]ased on the language of the statute, as well as both the majority and minority legislative history, courts should not give effect to an employer's unilateral imposition of a binding arbitration clause where Title VII rights are at issue").

171. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1199 n.17 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 445 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 364-65 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

172. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (stating that "such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like



employer may not condition employment on an employee's agreement to waive the right to be free from discrimination.<sup>173</sup> Conditioning employment on such a waiver would violate Title VII.<sup>174</sup> In a similar fashion, an employer should not be permitted to require that an employee waive access to a particular forum for the resolution of discrimination claims as a condition of employment.<sup>175</sup> While the Court in *Gilmer* concluded that an employee who has made use of arbitration as a condition of employment "effectively may vindicate [his or her] statutory cause of action in the arbitral forum,"<sup>176</sup> an agreement to arbitrate employment disputes must still be carefully scrutinized to ensure procedural and substantive fairness.<sup>177</sup> The Court's endorsement of

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the ADEA and Title VII"); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 644 ("The Supreme Court in the *Gilmer* case did not hold that *any* sort of arbitration procedure before *any* manner of arbitrator would be satisfactory in the adjudication of public rights.").

173. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[T]here can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII."); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995) ("It is the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA."); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) ("[T]here can be no prospective waiver of an employee's rights under Title VII.") (quoting *Gardner-Denver*, 415 U.S. at 51)).

174. See *Cole*, 105 F.3d at 1482.

175. See *id.*; see also JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 144-45 (1983) (preservation of "individual rights requires an accessible legal system for their protection" and enforcement).

176. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

177. See Gorman, *supra* note 172, at 645.

[D]espite the strong FAA policy of ordering arbitration hearings and implementing arbitration awards, minimal standards of procedural fairness must be satisfied before a civil action may be stayed and arbitration ordered. . . . [A] federal court, before enforcing an employer's demand for arbitration under an employment contract,

arbitration in *Gilmer* is also based on the assumption that "competent, conscientious, and impartial arbitrators" will be available.<sup>178</sup> The enforcement of an arbitration clause and the resulting arbitration decision in the collective bargaining context significantly differs, however, from the compulsory arbitration of a statutory claim.

*A. Comparing Arbitration in the Collective Bargaining Context with Compulsory Arbitration*

In the context of collective bargaining and labor/management relations, arbitration plays an important role for the settlement of labor disputes, and arbitration agreements are strictly enforced with little review provided for arbitration decisions.<sup>179</sup> As the Supreme Court explained in the *Steelworkers Trilogy*,<sup>180</sup> arbitration serves as the means for settling labor disputes as part of the collective bargaining process.<sup>181</sup> Collective bargaining arbitration also

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may—indeed must—scrutinize the agreed-upon or contemplated arbitration system.

*Id.*

178. *Gilmer*, 500 U.S. at 30 (quoting *Mitsubishi*, 473 U.S. at 634).

179. See *Cole*, 105 F.3d at 1473.

180. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

181. In the *Steelworkers Trilogy*, the Court explained the role of arbitration for settling labor disputes, the enforcement of arbitration agreements, and the relationship between an arbitrator and the courts. The Court stated in *Warrior & Gulf Navigation*:

In the commercial case, arbitration is the substitute for litigation. Here arbitration is a substitute for industrial strife. . . .

The collective bargaining agreement states the rights and duties of the parties. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant.

. . . The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

*Warrior & Gulf Navigation*, 363 U.S. at 578-81 (citations and footnotes omitted).

provides certain protections to minimize the danger of unfairness or errors by an arbitrator. For example, unions and employers that regularly use arbitration for resolving grievances under a collective bargaining agreement typically are involved in the selection of the arbitrator, so an arbitrator who is consistently biased in favor of one side will not be selected again.<sup>182</sup> In addition to simply refusing to hire a particular arbitrator, the parties to a collective bargaining agreement can also revise or rewrite the contract in order to correct perceived errors by an arbitrator.<sup>183</sup>

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In addition, the Court stated:

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

*Id.* at 581-82 (citations & footnotes omitted). The Court stated in *American Manufacturing Co.*:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the parties seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

*American Mfg. Co.*, 363 U.S. at 567-68.

182. See *Cole*, 105 F.3d at 1475; see also Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L. J. 916, 929-30 (1979).

183. See *Cole*, 105 F.3d at 1475; *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 7 (D.C. Cir. 1986); Gorman, *supra* note 172, at 669; Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L. J. 1187, 1195 (1993).

Interpreting the terms of the collective bargaining agreement is the responsibility of the arbitrator, and courts defer to the arbitrator's award "so long as [the decision] draws its essence from the collective bargaining agreement."<sup>184</sup> The arbitrator thus serves as the designated "reader" of the collective bargaining agreement, acting as the alter ego for the parties

for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. . . . In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award is their contract. . . . In sum, the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract.<sup>185</sup>

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184. *Enterprise Wheel*, 363 U.S. at 597. The Court stated that with regard to the judicial review of an arbitration award:

[P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

*Id.* at 599.

The Court further found that Judicial deference presumes, however, that:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from any sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

*Id.* at 597.

185. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) (footnote omitted); see also *American Postal Workers*, 789 F.2d at 6-7

Under the FAA, an arbitration award may be vacated on a number of grounds, including:

(1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators have exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>186</sup>

The FAA grounds are not exclusive, however, and in the collective bargaining context, awards may be set aside when contrary to "some explicit public policy" that is "well defined and dominant"<sup>187</sup> and ascertained "by reference to the laws and legal precedents."<sup>188</sup> In fact, arbitration awards have been vacated pursuant to a collective bargaining agreement when the award is inconsistent with public laws such as Title VII.<sup>189</sup> Arbitration awards may also

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(adopting Professor St. Antoine's analysis).

186. 9 U.S.C. § 10(a) (1994).

187. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

188. *See id.* at 43 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

189. *See, e.g., Stroeckmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1441-42 (3d Cir. 1992) (vacating an arbitration award that granted reinstatement to an employee fired for sexual harassment of a customer's employee due to a public policy against harassment and in favor of employer discipline for harassment by employees prohibiting the reinstatement of an employee guilty of harassment); *Newsday, Inc. v. Long Island Typographical Union, No. 915*, 915 F.2d 840, 844-45 (2d Cir. 1990) (vacating an arbitration award directing reinstatement of an employee who had committed several acts of harassment founded on the arbitrator's belief that the incidents did not require immediate discharge and finding that the award was contrary to a public policy

be vacated by a court if they are in "manifest disregard of the law."<sup>190</sup>

While judicial review of arbitral awards is extremely limited in the collective bargaining context, such deference may be inappropriate when an employee has been forced to arbitrate a statutory claim as a condition of employment.<sup>191</sup> In *Gilmer*, the Court assumed that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum,"<sup>192</sup> and that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue."<sup>193</sup> Because of the unique differences between arbitration in the collective bargaining arena and compulsory arbitration of

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against harassment manifested by Title VII and other laws and prevented the employer from fulfilling its legal duty to prevent sexual harassment in the workplace).

190. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). For various formulations of this standard, see, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (defining an award as being in manifest disregard of the law if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle"); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) (finding an award to be in manifest disregard of the law if the arbitrator deliberately disregards what he or she knows to be the law); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) (holding that a party seeking to set aside an award for manifest disregard of the law must show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact").

191. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

192. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 32 n.4 (1991) (quoting *Mitsubishi Motors Corp. v. Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985)).

193. *Id.* (quoting *Shearson/Anderson Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

statutory claims in the absence of a union, the principles from the Steelworkers Trilogy should not be extended to compulsory arbitration. Application of the presumption in favor of arbitrability and the extremely limited role of courts developed under the Trilogy to settings outside the collective bargaining context would be to separate the doctrine from its supporting justification; specifically, collective representation of shared employee interests and joint labor-management negotiation of the terms and conditions of employment.<sup>194</sup> Scholars have also argued that arbitral jurisprudence should not be extended from the collective bargaining area due to the fundamental distinction between contractual and statutory rights.<sup>195</sup> While contractual rights are created, defined and can be modified by the private parties who are subject to

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194. See *Cole*, 105 F.3d at 1475-76; Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 758 (1990); Gorman, *supra* note 172, at 678 ("Given the very different purposes, sources, and dynamics of grievance arbitration under collective agreements, that model cannot be imposed unquestioningly upon the post-Gilmer world of public-law arbitration."); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 511-15 (1990) (comparing the different models of arbitration in collective bargaining and statutory cases and stressing the important distinctions when analyzing features of arbitration).

195. As one scholar has argued:

If the award purports to resolve a claim under external law (and hence preclude relitigation of that claim in any other form), there is a public interest in the manner in which the external-law norms are articulated and applied in the arbitral form. Thus, . . . when arbitrators sit to adjudicate a dispute governed by external law, there is a tension between the tradition of limited judicial review of arbitration awards and the presence of an independent public interest in ensuring that the law is correctly and consistently being applied, and that substantive policies reflected in the law are neither under-enforced nor over-enforced.

Estreicher, *supra* note 194, at 777; see also Lamont E. Stallworth & Martin H. Malin, *Conflicts Arising out of Work Force Diversity*, PROC. OF THE 46TH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 104, 119 (1994) (on file with *The Wayne Law Review*) ("Many issues of public law require a choice between conflicting public values, which should be resolved by judges and other officials charged with lawmaking in the public interest, rather than by private dispute resolvers.").

arbitration, statutory rights are created, defined and are subject to modification only by Congress and the courts, thus suggesting the necessity of a public, rather than private, process to enforce those statutory rights.<sup>196</sup> In the collective bargaining context, an arbitrator serves as an agent or "alter ego" for the parties to the agreement, but an arbitrator who resolves a statutory claim pursuant to a compulsory arbitration agreement acts as a private judge.<sup>197</sup> In contrast to a judge, however, an arbitrator is privately rather than publicly chosen, and is not publicly accountable due to the limited review and private nature of the arbitration.<sup>198</sup>

Furthermore, the structural protections for the parties' interests in the collective bargaining context are not present in cases involving the compulsory arbitration of a statutory claim.<sup>199</sup> With the arbitration of a labor dispute pursuant to a collective bargaining agreement, both the union and the employer regularly participate in the arbitration process.<sup>200</sup> In contrast, while the employer will likely be familiar with the arbitration process with regard to compulsory arbitration of an individual statutory claim, the individual employee is likely a novice, and therefore the employer has an advantage with regard to the selection of an arbitrator.<sup>201</sup>

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196. See *Cole*, 105 F.3d at 1476.

197. See *id.*; Shell, *supra* note 194, at 512.

198. See *Cole*, 105 F.3d at 1476.

199. See *id.*

200. See *id.*

201. See, e.g., *Cole*, 105 F.3d at 1476-77; Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 403, 426 (1996) (arguing that "one-shot players" such as employees are less able to make an informed selection of an arbitrator than "repeat-player" companies); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 936 (1979) (same); Gorman, *supra* note 172, at 656 (same); Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 4-5 (1994) (arguing that an individual employee is disadvantaged in determining whether a specific arbitrator is neutral due to the lack of financial resources to research the arbitrator's past decisions); Sternlight, *supra* note 85, at 685 (arguing that "one-shot players" such as employees are less able to make an informed selection of an arbitrator than "repeat-player" companies).



In the collective bargaining context, the lack of public disclosure of awards is acceptable because the parties to the agreement monitor such decisions and the awards rarely involve concerns outside the parties subject to the agreement. In contrast to arbitration awards which carry little if any precedent outside a particular company and collective bargaining agreement, the resolution of a statutory claim in a judicial forum establishes binding precedent that is published and can be used to support other claims of statutory violations. Because of the limited precedential value and publication of arbitrators' decisions, a compulsory arbitration plaintiff may be prevented from obtaining the information from other lawsuits necessary to establish a claim of intentional misconduct or a pattern of discrimination.<sup>202</sup> This problem is further exacerbated by the presentation of a compulsory arbitration agreement on a "take-it-or-leave-it basis," with terms dictated by the employer and no union present to negotiate more favorable terms or aid in the selection of an arbitrator.<sup>203</sup>

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202. See *Cole*, 105 F.3d at 1477; Sternlight, *supra* note 85, at 686.

203. See *Cole*, 105 F.3d at 1477; Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254-55 (1983). Blumrosen states:

In non-unionized private sector employment, there is no organization analogous to the union to represent employee interests in developing arbitration procedures. Therefore, the employer and its lawyers have a comparatively free hand in drafting the details of an arbitration clause. . . . Under the circumstances, some employers may seek to unfairly narrow the legal rights of employees in the arbitration clause.

*Id.* (footnote omitted); L.M. Sixel, *Case Leads Employers to Rethink Arbitration Rules*, HOUS. CHRON., Jan. 29, 1996, available in 1996 WL 557981. Sixel states:

Starting about three years ago, employers trying to avoid big, expensive lawsuits began forcing their employees to agree to binding arbitration in order to keep their jobs or get new ones. And many employers adopted stiff, self-serving arbitration rules that, for example, prohibit punitive damages or put severe limits on evidence-gathering by employees.

*Id.*

*B. Concerns Regarding the Arbitration of Title VII Claims*

Commentators have expressed the concern that arbitrators lack the competence to analyze and decide the legal issues raised by a statutory claim because many arbitrators are not lawyers, lack the training and experience in the required legal analysis performed by a judge, and do not use appropriate legal precedent.<sup>204</sup> In fact, arbitrators in the security industry are not required to strictly follow the law, are given wide latitude in their interpretation of legal concepts, are not required to do legal research in reaching their decisions, are not expected to be experts in discrimination law, and are instructed that it may be impractical for even one member of a securities industry arbitration panel to be particularly

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204. See Richard H. Block & Elizabeth A. Barasch, *Practical Ramifications of Arbitration of Employment Discrimination Claims*, PROCEEDINGS OF N.Y.U. 44TH ANNUAL CONFERENCE ON LABOR 281 (1991) (footnotes omitted). Block and Barasch stated:

For instance, arbitrators often cite to and rely extensively on treatises . . . . A court is unlikely to rely on a treatise—even . . . a widely respected one. Similarly, arbitrators frequently rely on leading cases on the subject of employment discrimination, . . . without citing to subsequent lower courts or less publicized cases. This means that an arbitrator's decision may be based on broad stroke principles to the exclusion of cases more analogous to the claim being decided. Nor do arbitrators always analyze an intentional discrimination case within the judicially accepted three-prong framework articulated by the Supreme Court in *Burdine* and *McDonnell Douglas*.

*Id.* at 294; see also Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, PROC. OF THE 28TH ANN. MEETING OF THE NAT'L. ACAD. OF ARBITRATORS 59, 71-72 (1976) (reporting that at least 16% of arbitrators have never read any judicial opinions involving Title VII, 40% do not read advance sheets for recent developments under Title VII, but 50% of those arbitrators still consider themselves "professionally competent to decide 'legal' issues in cases involving" employment discrimination despite having never read a judicial opinion on employment discrimination or advance sheets); C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J., 347, 359 n.57 (1990-1991) (discussing and documenting concern in the securities industry over arbitrator's lack of training and qualifications in handling complex statutory cases).

knowledgeable in the area of employment discrimination law.<sup>205</sup> These concerns are not new or novel. In fact, the Supreme Court has expressed similar disquietude when hesitating to endorse the arbitration of statutory claims.<sup>206</sup> In *Gardner-Denver*, the Court, in questioning an arbitrator's competence to decide legal issues, noted that "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language

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205. See Opening Brief of Appellant at 32 n.20, *Duffield v. Robertson Stephens & Co.*, 114 F.3d 1182 (9th Cir. 1998) (Mem.).

206. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54-59 (1974) (holding that grievance arbitration of a discrimination claim does not preclude the subsequent litigation of Title VII claims or require deferral by a court to the arbitration award); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (holding that claims under the Securities Act of 1933 are not subject to arbitration). In his unanimous opinion in *Gardner-Denver*, Justice Powell listed the inadequacies of arbitration for a Title VII dispute:

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . . . Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. The same characteristics, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

*Gardner-Denver*, 415 U.S. at 56-58 (internal citations omitted).

frequently can be given meaning only by reference to public law concepts," thus concluding that arbitration was an ill-suited mechanism for the resolution of Title VII claims.<sup>207</sup> The Court further noted that the arbitrator's authority is limited to interpreting and applying the parties' intent as expressed in the collective bargaining agreement, and thus the arbitrator may not base an award solely upon his or her view of substantive rights created by a statute.<sup>208</sup>

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207. *Gardner-Denver*, 415 U.S. at 54-57. In *Gilmer*, however, the Supreme Court appeared to dismiss such "generalized attacks on arbitration" as based "on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" and "far out of step with [the] current strong endorsement" of arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). In stating a general rule that statutory claims are subject to binding arbitration outside of the collective bargaining situation, the Court emphasized that "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 26 (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court emphasized that "[As] so long as the prospective litigant effectively may vindicate [a] statutory cause of action in an arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637). As one court has explained, the Supreme Court "saw a critical distinction in the situations raised by *Gardner-Denver* and *Gilmer*. *Gardner-Denver* involved arbitration in the context of collective bargaining, which almost invariably means that the union controls the presentation of the statutory issue to the arbitrator." *Cole*, 105 F. 3d at 1478. The court stated that:

[A]rbitration might not be fair to the individual employee, because an arbitrator would of necessity be required to deal with the union's interest . . . , and the union's interests are not necessarily the same as the employee's interests, especially with respect to a claim of employment discrimination. *Gilmer*, on the other hand, raised an individual employee claim outside the collective bargaining context, so that the pitfalls seen in *Gardner-Denver* did not present themselves in *Gilmer*.

*Id.*

208. See *Gardner-Denver*, 415 U.S. at 53; see also *Levy*, *supra* note 19, at 457 (stating that "an arbitrator's authority is limited to giving effect to the intent of the parties to the arbitration, and . . . an arbitrator has no general mandate to interpret laws that might be in conflict with the bargain between the parties");

The Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) have both expressed concerns regarding the ability of the arbitration process to live up to the Court's assumptions with claims involving the compulsory arbitration of a statutory claim imposed as a condition of employment. Although the agency favors voluntary arbitration, the EEOC has consistently opposed the enforcement of compulsory arbitration clauses imposed as a condition of employment, and has filed amicus briefs in several cases arguing that compulsory arbitration clauses should not be enforced.<sup>209</sup> Specifically, the EEOC objects to the following procedures:

[Arbitration] (1) is not governed by the statutory

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St. Antoine, *supra* note 185, at 1143. Discussing the role of an arbitrator in the collective bargaining context, Professor St. Antoine stated:

If a contract clause . . . plainly tracks certain statutory language, an arbitrator is within his rights in inferring that the parties intended their agreement to be construed in accordance with the statute. Similarly, the parties may explicitly agree that they will abide by the arbitrator's interpretation of a statute whose meaning is in dispute between them. In each of these instances, . . . technically the arbitrator's award implements the parties' agreement to be bound by his analysis of the statute, rather than by the statute itself.

*Id.*

209. EEOC Commissioner Paul Miller has stated: "The problem is mandatory arbitration clauses that are imposed on employees as a condition of employment or continuing employment. We basically see these as ways to circumvent a party's right to file in federal court and their civil rights as set out by Congress." Margaret A. Jacobs, *Firms with Policies Requiring Arbitration Are Facing Obstacles*, WALL ST. J., Oct. 16, 1995, at B5; *see also* EEOC v. River Oaks Imaging & Diagnostic, No. H-95-755, 1995 WL 264003, at \*1 (S.D. Tex. Apr. 19, 1995) (successfully seeking an injunction against the enforcement of a unilaterally binding arbitration clause in which the employee's continued employment was conditioned on acceptance); Richard C. Reuben, *Two Agencies Review Forced Arbitration*, A.B.A. J., Aug. 1995, at 26 (discussing the case); *see also, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1190 (1998), *cert. denied*, 119 S. Ct. 445 (1998); Cosgrove v. Shearson Lehman Bros., 105 F.3d 659 (6th Cir. 1997) (Amicus brief filed by EEOC); Johnson v. Hubbard Broad. Inc., 940 F. Supp. 1447 (D. Minn. 1996) (Amicus brief filed by EEOC).

requirements and standards of Title VII; (2) is conducted by arbitrators given no training and possessing no expertise in employment law; (3) routinely does not permit plaintiffs to receive punitive damages and attorneys fees to which they would otherwise be entitled under the statutes; and (4) forces them to pay exorbitant 'forum fees' in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.<sup>210</sup>

Adopting a similar view, the National Labor Relations Board has previously described a compulsory arbitration agreement as an unfair labor practice.<sup>211</sup>

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210. Levy, *supra* note 19, at 478. In an effort to address some of these concerns, the American Arbitration Association provides the following rules for the arbitration of an employment dispute. See AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (effective June 1, 1996) <[http://www.adr.org/rules/employment\\_rules.html](http://www.adr.org/rules/employment_rules.html)> [hereinafter AAA Rules]. Rule 7 provides that the arbitrator has the "authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute." *Id.* Rule 32(b) requires that the "award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise." *Id.* Rule 32(c) states "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including, but not limited to, any remedy or relief that would have been available to the parties had the matter been heard in court." *Id.* Rule 35 provides that a filing fee of \$500.00 must be submitted by the initiating parties, subject to final apportionment by the arbitrator and the award, and an administrative fee of \$150.00 per hearing day must be paid by each party, but the AAA "may, in the event of extreme hardship on any party, defer or reduce the administrative fees." *Id.* Rule 36 provides that the parties will share equally the expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and witnesses, unless the parties agree otherwise or the arbitrator directs otherwise in the award. See *id.* Rule 37 states that the parties are to agree with the arbitrator on appropriate compensation for the arbitrator's work, but if the parties cannot agree with the arbitrator, the arbitrator's fee will be set by AAA. See *id.* Payment of the fee is made through AAA, not directly between the parties and the arbitrator. See *id.*

211. See Jacobs, *supra* note 209, at B5 (quoting Rochelle Kentov, Regional

A serious concern arises when a company requires an employee to pay all or part of an arbitrator's fee in an effort to discourage the employee from pursuing a claim.<sup>212</sup> Although arbitration is frequently touted as an inexpensive process, an arbitrator's fees can not be characterized as easily affordable. For example, the American Arbitration Association (AAA) identifies \$700 per day as the average arbitrator's fee.<sup>213</sup> The AAA rules also fail to prescribe any specific allocation of responsibility for payment of the arbitrator's fee in an employment dispute.<sup>214</sup> In contrast, the AAA Labor Arbitration Rules provides that "[u]nless mutually agreed otherwise, the arbitrator's compensation shall be borne equally by the parties, in accordance with a fee structure disclosed in the arbitrator's biographical profiles submitted to the parties."<sup>215</sup> JAMS/Endispute arbitrators charge an average of \$400 per hour, but other arbitrator's fees of \$500 to \$600 per hour are not

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Director of NLRB in Tampa, Florida: "[T]he requirement that an employee or job applicant sign a mandatory arbitration policy is an unfair labor practice, as is their discharge for not signing"). *But see NLRB General Counsel Report, January to September 1995*, DAILY LAB. REP. (BNA) No. 36, at E-6-7 (Feb. 23, 1996) (suggesting that the Board will only find an unfair labor practice if a compulsory arbitration agreement inhibits an employee's ability to file charges).

212. See Blumrosen, *supra* note 203, at 262 (proposing a model arbitration clause requiring the employer to pay the arbitrator's fee because "to tax the employee with the burden of paying for a private judge might seem overreaching" when the employer is already "avoiding the risk of a jury trial"); Sternlight, *supra* note 85, at 682-83 (suggesting that an employer could require the employee to pay the arbitrator's fees as a way to structure the arbitration clause in order to discourage claims, and noting that "at least when one goes to court the judge is free"); Ellie Winninghoff, *In Arbitration, Pitfalls for Consumers*, N.Y. TIMES, Oct. 22, 1994, at 37 (quoting an attorney with arbitration experience as stating it is a myth "that [arbitration is] cheaper — that is definitely not true. If you go to trial, you get the judge for free").

213. See Kenneth May, *Arbitration: Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, DAILY LAB. REP. (BNA) No. 31, at D-16 (Feb. 15, 1996).

214. See AAA Rules, *supra* note 210.

215. AMERICAN ARBITRATION ASSOCIATION LABOR ARBITRATION RULES, Rule 44 (effective Jan. 1, 1996).

uncommon.<sup>216</sup> The CPR Institute for Dispute Resolution estimates the arbitrator's fee to be \$250 to \$350 per hour, with fifteen to forty hours of the arbitrator's time required in a typical employment dispute case, for a total arbitrator's fee of \$3,750 to \$14,000 in an average case.<sup>217</sup>

If arbitration is to serve as a substitute for a judicial forum, requiring employees to pay for the service of an arbitrator when they would never be required to pay for a judge in court conflicts with Congress' intent to make discrimination claims easier to bring and prove in federal court. In federal court, both parties may be required to pay the cost of filing fees and other administrative expenses, so similar costs would be reasonable and acceptable in the arbitration process. But note that even when an employee is not required to pay any part of an arbitrator's fee, arbitration can still be quite expensive. Under the American Arbitration Association plan, an employee can be required to pay a filing fee of \$500 (as compared with a \$120 filing fee required to pursue a claim in federal district court), administrative fees of \$150 per day, room rental fees, court reporter fees, and, of course, attorney's fees in the event the employee hires a private attorney.<sup>218</sup> While the filing fee and other administrative fees may be reduced or deferred in cases of hardship under AAA Rule 35, when an employee is required to pay an arbitrator's fee ranging from \$500 to \$1,000 per day or more in addition to the administrative and filing fees, as well as the cost of an attorney, it is unlikely that a plaintiff will be able to afford pursuing a statutory claim.<sup>219</sup> Requiring an employee to pay an

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216. See Alleyne, *supra* note 201, at 410 n.189; Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 27, 1996, at A1; David Segal, *Have Name Recognition, Will Mediate Disputes*, WASH. POST, Dec. 16, 1996, at Wash. Bus. 5.

217. See CPR INST. FOR DISPUTE RESOLUTION, EMPLOYMENT ADR: A DISPUTE RESOLUTION PROGRAM FOR CORPORATE EMPLOYERS, § I 13 (1995).

218. See AAA Rules, *supra* note 210.

219. See DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NON-UNION WORKPLACE 291 (1989). Ewing quotes corporate director of industrial relations at Northrop explaining why Northrop pays arbitrator's fees: "[W]e bear the cost of the arbitration for the very practical reason that most



arbitrator's fees, especially when an employee has been fired or constructively discharged from his or her job, could be prohibitively expensive and arguably unacceptable because such fees are not required to pursue a statutory claim in a judicial forum.<sup>220</sup> When arbitration is mandated by the employer as a condition of employment, the arbitrator's fees should be born solely by the employer because the employee would be free to pursue the claim in court without paying for the judge's services in the absence of the compulsory arbitration requirement.<sup>221</sup> In response to this contention, some commentators have argued that it would be erroneous to permit the arbitrator to be paid only by the employer, due to the danger of the arbitrator favoring the employer in order to ensure that the arbitrator is selected for future arbitrations.<sup>222</sup> But if an arbitrator favors the employer, it would likely occur in order to curry the employer's favor for future business, rather than because the employer pays for the services.<sup>223</sup> Furthermore, if an

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of the employees who seek arbitration of their grievances simply couldn't afford it if we did not." *Id.*; see also Kathryn Cranhold, *Solo Legal Arbitrator's Put Longtime Leader in a Jam*, WALL ST. J., Nov. 13, 1996, available in 1996 WL-WSJ 11805966 (discussing the huge amounts of money involved in the arbitration business); Jacobs, *supra* note 209, at A1 (same); REPORT AND RECOMMENDATIONS, *supra* note 17, at 28 n.5 (capping employee contribution for costs of arbitration fees and expenses at \$50 in cases initiated by employees); U.S. GEN. ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTORS: EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150 at 14 (1995) (noting that a majority of arbitration plans which address the distribution of responsibility for an arbitrator's fees either cap the employee's share or provide for the employer to pay all arbitration costs).

220. See *Cole v. Burns Int'l. Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

221. See *id.* at 1484-85.

222. See *id.* at 1485.

223. See, e.g., Mark Berger, *Can Employment Law Arbitration Work?*, 61 U. MO. KANSAS CITY L. REV. 693, 714 (1993) ("[S]ince employers rather than individual employees are more likely to have repeat participation in the employment dispute arbitration process, arbitrators are more likely to rule in their favor in order to increase their chances of being selected to arbitrate future claims."); see also, e.g., Alleyne, *supra* note 201, at 426 (noting the temptation for

arbitrator systematically favors employers in order to obtain future business, such a corrupt arbitrator would likely be quickly identified by plaintiff's lawyers or an agency such as AAA. Note, however, that a typical employee may not have the funds or resources to fully check an arbitrator's background and past decisions, and, unlike judicial decisions, arbitration decisions are not routinely reported. Furthermore, the employee is being forced into a forum that generally favors the interests of employers at the expense of depriving plaintiffs of the specific remedial protections of federal law.<sup>224</sup>

## VI. CONCLUSION

As the Supreme Court has stated, an agreement to arbitrate must generally be treated so as to not require the plaintiff to "forego the substantive rights afforded by [a] statute."<sup>225</sup> By

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an arbitrator to favor the employer's interest); Block and Barasch, *supra* note 204, at 298 (stating that an arbitrator has a financial interest in pleasing an employer by either denying the employee's claim or limiting the relief awarded because the employer may be a frequent user of arbitration); Getman, *supra* note 201, at 936 (same); Gorman, *supra* note 172, at 656 (same). See generally Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LABOR L.J. 108 (1996) (finding that employees recover less on their claims against repeat-player companies, defined as companies that use arbitration more than once in a year, than they do against non-repeat players; Sternlight, *supra* note 85, at 685 (citing unpublished study by Professor Bingham)).

224. See Alleyne, *supra* note 201, at 428 (stating that "statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side"); Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims after Gilmer v. Interstate/Johnson Lane Corp.*, 21 EMPL. REL. L.J. 43 (1995) (encouraging employers to use arbitration because "employers stand a greater chance of success in arbitration" and are subjected to "smaller" damage awards).

225. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.

submitting a claim to compulsory arbitration, a plaintiff is not only foregoing the procedural right to bring a claim in federal court and seek a jury trial, but also, as a practical matter, potentially waiving important substantive rights. Although the same substantive rights to collect compensatory and punitive damages should be available in an arbitration procedure, an arbitrator may be reluctant to award such damages due to the adverse incentives caused by the fact that the arbitrator is selected by the parties, so an arbitrator with a reputation for awarding high damages to plaintiffs will not likely be chosen by employers for future arbitrations. Despite some of these shortcomings, arbitration, if fairly conducted, is not necessarily inferior to the courts as a method for resolving employment disputes.<sup>226</sup> In addition, a grieved employee is guaranteed a hearing on the merits in arbitration, but no such guarantee exists in litigation, and few employees are able to meet the procedural requirements to proceed to trial in federal court.<sup>227</sup> At a minimum, the arbitration must provide safeguards to protect the procedural and substantive rights of the claimant.<sup>228</sup>

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614, 628 (1985)).

226. As stated by the Dunlop Commission:

[L]itigation has become a less-than-ideal method of resolving employees' public law claims. . . . [E]mployees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation systems; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries. Finally, the litigation model of dispute resolution seems to be dominated by "ex-employee" complainants, indicating that the litigation system is less useful to employees who need redress for legitimate complaints, but also wish to remain in their current jobs.

REPORT AND RECOMMENDATIONS, *supra* note 17, at 30.

227. See *Cole*, 105 F.3d at 1488.

228. The Department of Labor Commission on Future of Worker-Management Relations ("Dunlop Commission"), chaired by John T. Dunlop, a former Secretary of Labor and current Professor Emeritus at Harvard University, provided the following consensus view among employers and

Despite the enforcement of compulsory arbitration agreements by federal courts, the trend may be to move towards a system of voluntary rather than compulsory arbitration. Recently, the National Association of Securities Dealers (NASD) has voted to eliminate mandatory arbitration agreements for civil rights claims. The proposal would implement three important changes: (1) employees would be permitted to "choose between entering into private arbitration agreements with their employers, or reserving the right to file a case in federal or state court for statutory discrimination claims;" (2) additional procedural protections would be implemented which follow the standards in the ABA's "Due Process Protocol;" and (3) the rule change would provide "enhanced

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employees regarding arbitration:

If private arbitration is asserted as a legitimate form of private enforcement of public employment law, these systems must provide: a neutral arbitrator who knows the laws in question and understands the concerns of the parties;

a fair and simple method by which the employee can secure the necessary information to present his or her claim;

a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees;

the right to independent representation if the employee wants it;

a range of remedies equal to those available through litigation;

a written opinion by the arbitrator explaining the rationale for the result;

and sufficient judicial review to ensure that the result is consistent with the governing laws.

REPORT AND RECOMMENDATIONS, *supra* note 17, at 30-31. Other committees, arbitration services, and scholars have suggested similar safeguards. See also *Statement by Professor Samuel Estreicher to the Commission on the Future of Worker-Management Relations Panel on Private Dispute Resolution Alternatives*, DAILY LAB. REP. (BNA) No. 188, at D-33 (Sept. 29, 1994); COMMITTEE ON LABOR AND EMPLOYMENT LAW, BAR ASS'N. OF THE CITY OF NEW YORK, FINAL REPORT ON MODEL RULES FOR THE ARBITRATION OF EMPLOYMENT DISPUTES, 629 (1995); see, e.g., Estreicher, *supra* note 194, at 791 (asserting that the arbitrator's written decision, based on a transcript, must conform to the substantive standards of the statute and award appropriate injunctive or monetary relief to remedy a violation, and a court should review the award to ensure such conformity and conclude that findings of fact are not clearly erroneous).

disclosure [of the arbitration rules] to employees.”<sup>229</sup> As expressed by Congress in the Civil Rights Act of 1991, such a system of voluntary arbitration and other forms of alternative dispute resolution should be encouraged.

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229. NASD PRESS RELEASE, *NASD Proposes Eliminating Mandatory Arbitration of Employment Discrimination Claims for Registered Brokers*, (Aug. 7, 1997) <[http://www.nasdaqnews.com/news/pr/ne\\_section97\\_52.html](http://www.nasdaqnews.com/news/pr/ne_section97_52.html)>; see also Deborah Lohse, *NASD Votes to End Arbitration Rule in Cases of Bias*, WALL STREET J., Aug. 8, 1977, at B14 (reporting rule change proposal, but highlighting that “mandatory arbitration is apt to continue, industry experts say, because the NASD is not forbidding firms from including arbitration requirements in their employment contracts”).

